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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First Named Applicant: Kitsukawa)	Art Unit: 2617
)	
Serial No.: 09/834,511)	Examiner: Sheleheda
)	
Filed: April 13, 2001)	50P4372
)	
For: SYSTEM AND METHOD FOR PUSHING)	November 9, 2005
INTERNET CONTENT ONTO INTERACTIVE)	750 B STREET, Suite 3120
TELEVISION)	San Diego, CA 92101
)	

REPLY BRIEF

Commissioner of Patents and Trademarks

Dear Sir:

This brief responds to the Examiner's Answer dated November 3, 2005.

The Answer continues to allege that the program schedule of the primary reference is "content" without any evidence of record supporting this expansive claim interpretation. Claims must be interpreted in light of the specification as one skilled in the art would interpret them. The present specification nowhere refers to "content" as encompassing a program listing. That being said, while Appellant is mindful that unclaimed limitations cannot be imported into the claims, the fact remains that no evidence to the contrary (i.e., that the skilled artisan regards program listings as "content") has been introduced into the record. In effect, the examiner is making a finding of fact - that "content" encompasses program listings - without any evidentiary support for the finding. Under the Administrative Procedures Act governing Patent Office conduct, rendering a finding of fact without evidentiary support is arbitrary and capricious agency action and should be reversed.

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The Answer emphasizes that the examiner agrees with Appellant that the primary reference fails to disclose pushing content or keying it to time of day. This admission perforce requires the requisite prior art suggestion to combine to come from Smith.

Turning to Smith, the Answer continues to cloud the issue by raising a hypothetical argument as to why pushing content would not frustrate Smith, conjecturing that while Appellant "feels" that downloading content as it becomes available "somehow translates into immediately downloading the instant it becomes available, this is clearly not the case." Appellant does not quite understand the relevance of this argument but notes that once again, the examiner is making a finding of fact that something "is clearly not the case" without pointing to any evidentiary support.

"The name of the game is the claim". Claim 1 requires downloading the Internet content regarding topics of interest *to the interactive television* (not to an unrelated cache) as the content regarding topics of interest becomes available and prior to receiving a consumer request for the Internet content. The Answer's obfuscation of the issue cannot serve to distract adjudication from the defect of the *prima facie* case, namely, that Smith et al. teaches pre-caching content when the caching strategy deems it appropriate, as opposed to when the content becomes available, and that pushing the content on an availability basis instead of on a programmed caching basis would frustrate the purpose of Smith et al., which is to provide an automatic caching strategy.

The Answer dismisses the actual language of the claims as argued by Appellant as "narrow, arbitrary limitations". But it doesn't matter whether the Examiner thinks Appellant has narrowly and arbitrarily drawn the claims. He must give weight to all claim limitations.

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The Answer concludes its attempt to rebut part (a) of Appellant's case in chief by explaining why, in the examiner's view, it is better to programmatically download content as taught by Smith ("by not downloading content earlier, when it probably isn't desired, Smith conserves bandwidth and memory") without understanding that he is only bolstering Appellant's point, namely, that Smith does not work like the present claims. The fact that the examiner is enamored of Smith's purported technical benefits does not change the fact that Smith does not do what is required by the claims rejected under this section.

With respect to Claim 15, the Answer alleges that this claim "in fact does not require allowing a user to choose what content is displayed when, as Appellant implies." This is a straw man. It is an argument that imputes an "implied" position to Appellant, which is then conveniently knocked down. Straw man arguments are irrelevant and do not militate against reversal of poorly grounded rejections.

To the extent that this part of the Answer was intended to be more than a straw man and instead to indicate a recitation that the Examiner otherwise would have found to be allowable, it is regrettable that this opinion has not heretofore been expressed.

The Answer then makes a leap in trying to contort Smith to teach something that it does not. Specifically, the Answer alleges that the user in Smith "has defined through their history a priority level", with the conferees evidently content with this distortion on the ground that the claims do not require the user to provide "an explicit definition of a priority level."

It is true that the words "explicit definition" are not in the claims. It is equally true that what is in the claims is not in Smith. In essence, the examiner is asking the Board to regard a user's past history of randomly hopping around various channels as meeting the claimed limitation of user-defined priority levels of topics of interest for different times of day. Nothing in Smith or in any other evidence that has been

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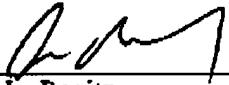
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identified makes such a breathtaking leap of imagination. In effect the examiner is contorting a mere activity that Smith nowhere indicates has anything to do with user-defined priority levels, much less ones that are keyed to different times of day, with an explicitly claimed limitation by arguing that another limitation is not explicitly claimed. Rejections, being ultimate conclusions of law, must be based on findings of fact supported by evidence of record. Rejections cannot be based on alchemy.

Respectfully submitted,


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